MOTION FILED
MAY 3 2001

(10)

MAY 3 2001

No. 99-1786

In the Supreme Court of the United States

GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY, EARTH SYSTEMS, INC., AND THE HEALTH AND WELFARE PLAN FOR EMPLOYEES AND DEPENDENTS OF EARTH SYSTEMS, INC.,

Petitioners,

v.

JANETTE KNUDSON AND ERIC KNUDSON,

Respondents.

On Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND AS AN *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

WILLIAM J. NELLIS
Secretary to the Board
of Trustees
Central States, Southeast
and Southwest Areas
Health and Welfare Fund
9377 W. Higgins Road
Rosemont, IL 60018
(847) 518-9800

JOHN A. KUKANKOS
Counsel of Record
JAMES L. COGHLAN
FRANCIS E. STEPNOWSKI
DEBRA M. CYRANOSKI
COGHLAN KUKANKOS COOK
One N. Franklin Street
Suite 900
Chicago, IL 60606
(312) 357-9200

Attorneys for Amicus Curiae

Midwest Law Printing Company/Photex — Chicago — (312) 321-0220

37 pp

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

Central States, Southeast and Southwest Areas Health and Welfare Fund ("Welfare Fund"), pursuant to Supreme Court Rule 37, respectfully moves this Honorable Supreme Court of the United States of America to grant it leave to file a brief *amicus curiae* in support of the position of Great-West Life & Annuity Insurance Company, Earth Systems, Inc., and Health and Welfare Plan for Employees and Dependents of Earth Systems, Inc. (collectively, "Petitioners" or "Great-West") to reverse the decision of the Ninth Circuit Court of Appeals. The Welfare Fund submits its brief *amicus curiae* together with this motion. In support, the Welfare Fund states:

1. On January 22, 2001, this Court granted the Welfare Fund's motion for leave to file a brief as *amicus curiae* in support of the Petition for a Writ of *Certiorari* in this case. The Welfare Fund now moves the Court for permission to file its brief *amicus curiae* in this case which is now before the Court for oral argument.

2. Petitioners have consented to the filing of the Welfare Fund's brief *amicus curiae*. The Welfare Fund has been unable to obtain the consent of Respondents Janette Knudson and Eric Knudson to the filing of the Welfare Fund's brief *amicus curiae*. Petitioners' letter of consent accompanies this motion for filing with the Clerk of this Court.

3. The Welfare Fund is a Taft-Hartley trust and an employee benefit plan under Section 3(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(1). *See Central States, Southeast & South-*

west Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 561-62 (1985), *reh'g denied*, 473 U.S. 926 (1985). Welfare Fund beneficiaries are teamsters and dependents of teamsters (collectively, "Beneficiaries") from local unions throughout the country. Under the terms of collective bargaining agreements negotiated between local unions and employers, employers pay contributions to the Welfare Fund to fund benefits for Beneficiaries.

4. The Welfare Fund provides medical, hospital, dental, disability, vision and life benefits to more than three hundred thousand Beneficiaries who reside in thirty-six states. The Welfare Fund is self-funded and not-for-profit. Like Petitioners, the Welfare Fund has implemented a subrogation program which it actively enforces in all jurisdictions where its Beneficiaries reside.

5. The issue in this case is whether an employee benefit plan regulated by ERISA can sue in federal court to obtain reimbursement of paid medical benefits from the proceeds of its beneficiary's personal injury settlement. The resolution of this issue depends upon whether such an action seeks equitable relief under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3).

6. The Welfare Fund seeks leave to file its brief *amicus curiae* to bring to the attention of the Court the effect which the Ninth Circuit's decision will have on large employee benefit plans, such as the Welfare Fund, which operate in many states. For these employee benefit plans, the decision of the Ninth Circuit, if allowed to stand, will cause the exact harm which Congress sought to prevent in enacting ERISA.

7. In enacting ERISA, Congress recognized the importance of employee benefit plans and the problems of administration which conflicting state and local regulation would cause for such plans. Congress further recognized the need for exclusive federal regulation of such plans to ensure uniformity in enforcement of plan terms. This Honorable Court has, on many occasions, noted these laudable goals of ERISA. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 99 (1983) (quoting 120 Cong. Rec. 29933 (1974)); *FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990).

8. The Ninth Circuit's decision, which is in conflict with decisions in other Circuits, directs plans to state court as the exclusive forum for enforcing the terms of the plan and redressing violations of the terms of the plan related to subrogation and reimbursement.

9. As discussed in the brief *amicus curiae*, the decision of the Ninth Circuit will have far-reaching deleterious effects on the Welfare Fund. Directing fiduciaries to state court to enforce plan terms and to seek redress for violations of plan terms will cause the exact patchwork administration of multistate plans which Congress sought to prevent in enacting ERISA. In addition, because ERISA provides for exclusive jurisdiction over such actions, certain state courts may refuse jurisdiction. Because ERISA preempts state laws, and because many states have a wide range of varying state laws which diminish or eliminate subrogation rights, state courts which do entertain jurisdiction may not provide appropriate relief. Contrary to the mandate of ERISA, plan fiduciaries will be unable to administer the plan and enforce plan terms.

10. Moreover, the decision of the Ninth Circuit at issue in this appeal is simply incorrect. Respondents hold settlement funds sufficient to satisfy Great-West's subrogation and reimbursement rights. They hold such funds for Great-West's use and benefit and plan terms require that Respondents return such funds to the plan. Traditional equitable remedies of specific performance, restitution and a constructive trust are all appropriate remedies to prevent Respondents' unjust enrichment.

11. Finally, subrogation realizes significant cost-savings for ERISA plans. Since its inception in 1984, the Welfare Fund's subrogation program has achieved direct reimbursements and savings of approximately $67.5 million. The decision of the Ninth Circuit, if allowed to stand, will result in the diminishment of subrogation recoveries and savings and, ultimately, in the reduction of benefits for Beneficiaries—a result further detracting from ERISA's goals as described in *Shaw*, 463 U.S. at 99, and *FMC*, 498 U.S. at 60.

For each of the above reasons, the Central States, Southeast and Southwest Areas Health and Welfare Fund requests this Honorable Court to grant it leave to file the Welfare Fund's brief *amicus curiae*.

Respectfully submitted,

JOHN A. KUKANKOS
One of the Attorneys for
Central States, Southeast
and Southwest Areas Health
and Welfare Fund

JOHN A. KUKANKOS
JAMES L. COGHLAN
FRANCIS E. STEPNOWSKI
DEBRA M. CYRANOSKI
COGHLAN KUKANKOS COOK
One North Franklin Street
Suite 900
Chicago, Illinois 60606
(312) 357-9200

WILLIAM J. NELLIS
Secretary to the Board of Trustees
Central States, Southeast
and Southwest Areas Health
and Welfare Fund
9377 West Higgins Road
Rosemont, Illinois 60018
(847) 518-9800

TABLE OF CONTENTS

PAGE

I. THE INTEREST OF THE *AMICUS CURIAE* 1

II. SUMMARY OF THE ARGUMENT 3

III. ARGUMENT 4

A. The Decision of the Court of Appeals for the Ninth Circuit, If Allowed To Stand, Will Create the Exact Administrative Morass which ERISA was Designed to Prevent. 4

1. In Promulgating ERISA, Congress Recognized the Importance of Employee Benefit Plans and the Need for Exclusive Federal Regulation of Such Plans to Ensure Uniformity in Enforcement of the Terms of the Plan. 4

2. The Decision of the Ninth Circuit Fosters the Very Harm Which Congress Sought to Prevent in Enacting ERISA 7

B. If Not Overturned, the Ninth Circuit's Decision Will Diminish a Valuable and Equitable Cost-Saving Mechanism for Self-Funded Plans 9

C. The Decision of the Ninth Circuit Limits the Ability of Plan Trustees to Administer the Plan in Accordance with ERISA's Mandate. 11

D. The Decision of the Ninth Circuit is Incorrect. Various Forms of Appropriate Equitable Relief Are Available to Plans Which Seek to Enforce Subrogation and Reimbursement Rights 14

1. The Instant Case in Which Plan Trustees Seek to Enforce Plan Terms Against a Plan Beneficiary is Distinguishable from *Mertens v. Hewitt Associates* 14

2. A Fiduciary Suing to Enforce Subrogation and Reimbursement Rights Set Forth in the Plan Seeks Specific Performance of Plan Terms 15

3. Restitution and a Constructive Trust are Additional Equitable Remedies Available to Plans Seeking to Enforce Subrogation and Reimbursement Rights. 20

IV. CONCLUSION 22

TABLE OF AUTHORITIES

Cases **PAGE(S)**

Administrative Comm. v. Gauf,
188 F.3d 767 (7th Cir. 1999) 16

Blue Cross & Blue Shield of Ala. v. Sanders,
138 F.3d 1347 (11th Cir. 1998) 16

Bollman Hat Co. v. Root,
112 F.3d 113 (3rd Cir. 1997),
cert. denied, 522 U.S. 952 (1997) 8

Bowen v. Massachusetts,
487 U.S. 879 (1988) 16, 17, 18, 19, 20

Cagle v. Bruner,
112 F.3d 1510 (11th Cir. 1997),
reh'g denied, 124 F.3d 223 (11th Cir. 1997) 13

Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.,
472 U.S. 559 (1985), *reh'g denied*, 473 U.S. 926 (1985) 1

Community Ins. Co. v. Richardson,
172 F.3d 872 (6th Cir. 1999) 8

Copeland Oaks v. Haupt,
209 F.3d 811 (6th Cir. 2000) 13

Curtis v. Loether,
415 U.S. 189 (1974) 21

Cutting v. Jerome Foods, Inc.,
993 F.2d 1293 (7th Cir. 1993),
cert. denied, 510 U.S. 916 (1993) 9, 13

Davis v. Line Constr. Benefit Fund,
589 F. Supp. 146 (W.D. Mo. 1984) 8

Department of Army v. Blue Fox, Inc.,
525 U.S. 255 (1999) 18

Descant v. Administrators of the Tulane Educ. Fund, 706 So. 2d 618 (La. Ct. App. 1998) 7

Egelhoff v. Egelhoff,
121 S. Ct. 1322 (2001) 5, 6

Electro-Mechanical Corp. v. Ogan,
9 F.3d 445 (6th Cir. 1993) 8

Fields v. Farmers Ins. Co., Inc.,
18 F.3d 831 (10th Cir. 1994) 9

Firestone Tire & Rubber Co. v. Bruch,
489 U.S. 101 (1989) 13

FMC Corp. v. Holliday,
498 U.S. 52 (1990) 5, 8, 10

FMC Medical Plan v. Owens,
122 F.3d 1258 (9th Cir. 1997) 14

Fort Halifax Packing Co., Inc. v. Coyne,
482 U.S. 1 (1987) 5, 9, 10

Hampton Indus., Inc. v. Sparrow,
981 F.2d 726 (4th Cir. 1992) 8

Harris v. Harvard Pilgrim Health Care, Inc.,
208 F.3d 274 (1st Cir. 2000) 13

Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238 (2000) 22

Health Cost Controls v. Isbell,
139 F.3d 1070 (6th Cir. 1997) 8

Health Cost Controls v. Washington,
187 F.3d 703 (7th Cir. 1999),
cert. denied, 120 S. Ct. 979 (2000) 12

Hiney Printing Co. v. Brantner, 243
F.3d 956 (6th Cir. 2001) 13

Ingersoll-Rand Co. v. McClendon,
498 U.S. 133 (1990) 7

Jefferson-Pilot Life Ins. Co. v. Krafka,
57 Cal. Rptr.2d 723 (Cal. Ct. App. 1996) 7

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949),
reh'g denied, 338 U.S. 840 (1949) 17

Maryland Dept. of Human Resources v. Department of Health & Human Services,
763 F.2d 1441 (D.C. Cir. 1985) 17, 18, 19

Mertens v. Hewitt Assocs.,
508 U.S. 248 (1993) 14, 19

Pilot Life Ins. Co. v. Dedeaux,
481 U.S. 41 (1987) 6, 7

Ryan v. Federal Express Corp.,
78 F.3d 123 (3rd Cir. 1996) 8

School Comm. of Burlington v. Department of Educ. of Massachusetts, 471
U.S. 359 (1985) 20

Shaw v. Delta Air Lines, Inc.,
463 U.S. 85 (1983) 5, 9

Southern Council of Indus. Workers v. Ford,
83 F.3d 966 (8th Cir. 1996) 16

Sunbeam-Oster Co., Inc. v. Whitehurst,
102 F.3d 1368 (5th Cir. 1996) 13

Tull v. United States,
481 U.S. 412 (1987) 21

United McGill Corp. v. Stinnett,
154 F.3d 168 (4th Cir. 1998) 8

Walker v. Wal-Mart Stores, Inc.,
159 F.3d 938 (5th Cir. 1998) 8

Waller v. Hormel Foods Corp.,
120 F.3d 138 (8th Cir. 1997) 8

Wendy's Int'l, Inc. v. Karsko,
94 F.3d 1010 (6th Cir. 1996) 13

Statutes

5 U.S.C. § 702 16

29 U.S.C. § 186 1

29 U.S.C. § 1001(a) 4

29 U.S.C. § 1002(1) 1

29 U.S.C. § 1102(a)(1) 11

29 U.S.C. § 1104(a)(1)(A) 2

29 U.S.C. § 1132(a)(3) 6, 7, 11, 15

29 U.S.C. § 1132(e) 6, 7, 11

29 U.S.C. § 1144 ..... 5, 10

Other Authorities

Black's Law Dictionary 910 (6th ed. 1991) 21

120 Cong. Rec. 29933 (1974) 5

Dan B. Dobbs, *Handbook on the Law of Remedies* § 3.1, at 135 (1973) 19

H.R. Rep. No. 1785, 94th Cong., 2d Sess.,
at 47 (1977) 5

H.R. Rep. No. 533, 93rd Cong., 1st Sess., at 12 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4650 ..... 6, 10

16 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance 3D* § 222:5 (2000) 20

16 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance 3D* § 223:89 (2000) 20, 21

Restatement of Restitution § 1 (1937) 21

Restatement of Restitution § 160 (1937) 21

Restatement of Restitution § 160 cmt. d (1937) 21

Restatement (Second) of Trusts § 1 cmt. e (1959) ... 21

Sup. Ct. R. 37.3(a) 1

Sup. Ct. R. 37.6 1

BRIEF OF *AMICUS CURIAE*

I. THE INTEREST OF THE *AMICUS CURIAE*

Central States, Southeast and Southwest Areas Health and Welfare Fund ("Welfare Fund") is an employee benefit plan under Section 3(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(1). *See Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 561-62 (1985), *reh'g denied*, 473 U.S. 926 (1985).[1] Welfare Fund beneficiaries are teamsters and dependents of teamsters (collectively, "Beneficiaries") from local unions throughout the country. These teamsters and their employers negotiate collective bargaining agreements requiring the employers to pay a certain level of contributions to the Welfare Fund in return for a set benefit package offered by the Welfare Fund for that particular contribution level. Each contributing employer executes a participation agreement with the Welfare Fund agreeing, among other things, to pay the required contributions and to abide by all rules and regulations set by the Welfare Fund Trustees who administer the Welfare Fund. Established under the Taft-Hartley Act, the Welfare Fund has ten trustees—five appointed by contributing employers and five elected by the unions whose members are Beneficiaries. *See* 29 U.S.C. § 186.

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[1] As provided in Sup. Ct. R. 37.6, the Welfare Fund confirms that no counsel for any party authored any part of this brief, and that no person other than *amicus curiae*, its members, or its counsel made any monetary contribution to the preparation or submission of this brief. As provided in Sup. Ct. R. 37.3(a), the Welfare Fund states that Petitioners have consented and Respondents have not consented to the filing of the Welfare Fund's brief as *amicus curiae*.

The Welfare Fund provides medical, hospital, dental, vision, life and disability benefits to more than three hundred thousand Beneficiaries who reside in thirty-six states. The Welfare Fund is self-funded and pays benefits directly from the contributions of participating employers. The Welfare Fund is not-for-profit, and its assets are used exclusively to provide benefits for Beneficiaries and to defray the reasonable costs of administering the benefit plan. *See* 29 U.S.C. § 1104(a)(1)(A).

In accord with ERISA's "prudent man" investment standards, Welfare Fund Trustees have implemented cost-containment measures including the promulgation of subrogation and reimbursement provisions. Since its inception in 1984, the Welfare Fund's subrogation program has achieved recoveries and savings totaling approximately $67.5 million.

Since benefit levels are based on actuarial assumptions which assume a certain level of subrogation and reimbursement recoveries, such recoveries are necessary to provide assets sufficient to fund the benefit levels stated in the various benefit plans offered by the Welfare Fund. Like other large multiemployer plans where contribution rates are set pursuant to collective bargaining and participation agreements, the Welfare Fund cannot unilaterally increase contribution rates. Thus, if subrogation recoveries are reduced, benefits provided to Beneficiaries will be correspondingly reduced.

The impact of the Ninth Circuit's decision on the Welfare Fund and other large multistate plans will be substantial. That decision denies ERISA plans access to federal courts to enforce subrogation and reimbursement rights and to redress violations of those rights. As discussed within, the Ninth Circuit's decision will result in

the nonuniform enforcement of plans, an increase in administrative costs for plans, and reduced subrogation recoveries—all to the detriment of plan beneficiaries.

II. SUMMARY OF THE ARGUMENT

The Welfare Fund seeks to bring to the Court's attention the impact which the Ninth Circuit's decision will have on multistate and multiemployer plans such as the Welfare Fund whose Beneficiaries reside in many states. When enacting ERISA into law, Congress recognized the need for exclusive federal regulation to eliminate conflicting state and local regulation of such plans. To achieve these ends, Congress enacted ERISA's preemption provision and directed plan fiduciaries to federal district courts as the exclusive forum over actions to enforce plan terms and redress violations of plan terms. The decision of the Ninth Circuit, which holds that ERISA provides no relief in this case, completely reverses these Congressional mandates.

Because ERISA provides that federal district courts have exclusive jurisdiction over actions to enforce plan terms regarding subrogation, state courts may not entertain such actions. State courts which do accept jurisdiction may not afford sufficient or uniform relief due to ERISA's preemption provision and the varying state antisubrogation laws. Given all of the above, the Ninth Circuit's action will not only result in the exact piecemeal enforcement of plan terms which ERISA was designed to prevent, but will also greatly limit the ability of plan fiduciaries to enforce plan terms as required by ERISA and the common law of trusts. The end result will be higher administrative costs, lower subrogation recoveries, and the loss of benefits for plan beneficiaries.

Finally, the decision of the Ninth Circuit is simply incorrect. As discussed within, Great-West seeks equitable relief in this case. The fact that Great-West is subrogated to Janette Knudson's rights of recovery means that her rights belong to Great-West. Once Janette Knudson asserts those rights and receives money in return, that money properly belongs to Great-West. Great-West is entitled to specific performance of the terms of its plan which require the payment of those funds to the plan. Moreover, when Janette Knudson refuses to surrender those funds to Great-West, she is unjustly enriched. Great-West is also entitled to the additional equitable remedies of restitution of these funds and the imposition of a constructive trust over these funds.

III. ARGUMENT

A. The Decision of the Court of Appeals for the Ninth Circuit, If Allowed To Stand, Will Create the Exact Administrative Morass which ERISA was Designed to Prevent.

1. In Promulgating ERISA, Congress Recognized the Importance of Employee Benefit Plans and the Need for Exclusive Federal Regulation of Such Plans to Ensure Uniformity in Enforcement of the Terms of the Plan.

In enacting ERISA, Congress recognized that employee benefit plans involve the national public interest and stressed the importance of uniform federal regulation of such plans. 29 U.S.C. § 1001(a). Both ERISA's legislative sponsors and this Court have emphasized the necessity for uniform federal regulation of not only the substantive provisions, but also the enforcement provisions applicable to ERISA plans. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 99 (1983) (quoting 120 Cong. Rec. 29933 (1974));[2] *see also FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990).

To enable plan Trustees to structure uniform plan provisions for all participants and to seek redress for violations of those provisions, Congress enacted ERISA's preemption provision which preempts state laws which relate to ERISA plans. *See* 29 U.S.C. §1144.[3] To further

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[2] Congress rejected amendments to ERISA which would have required ERISA plans to comply with multiple and potentially conflicting state laws which would raise the possibility of "endless litigation" on issues of whether state regulation impinged upon federal regulation. *Shaw*, 463 U.S. at 99 n.20. Thus, after a period of monitoring by the Congressional Pension Task Force and hearings by a House Subcommittee, a report evaluating ERISA's preemption provisions was issued, stating that "'the Federal interest and the need for national uniformity are so great that enforcement of state regulation should be precluded.'" *Id.* (quoting H.R. Rep. No. 1785, 94th Cong., 2d Sess., at 47 (1977)).

[3] This Court has also recognized the disruptive effect that state regulation would have on ERISA plans. In *Shaw*, the Court, noting that the obligation of the plans to comply with "the varied and perhaps conflicting" requirements of particular state fair employment laws would make nationwide administration of plans more difficult, found that ERISA preempted New York's Disability Benefits Law. 463 U.S. at 105 n.25. In *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1 (1987), this Court recognized that requiring an employer to adopt different payment formulae for employees inside and outside the State would subject the employer to precisely the burden that ERISA preemption was intended to eliminate. *Id.* at 10. Similarly, in *Egelhoff v. Egelhoff*, 121 S. Ct. 1322

(continued...)

this same uniformity, Congress enacted Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), ERISA's enforcement provision. Section 502(a)(3) allows plans to sue to obtain equitable relief to enforce plan terms and redress violations of plan terms. To ensure uniform enforcement of plan terms, Congress stated that federal district courts shall have exclusive jurisdiction over such actions. *See* 29 U.S.C. § 1132(e).

ERISA's uniform enforcement mechanism complements ERISA's administrative scheme. In *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), this Court again confirmed that ERISA was designed to achieve uniformity of decision to assist fiduciaries "'to predict the legality of proposed actions without the necessity of reference to varying state laws.'" *Id.* at 56 (quoting H.R. Rep. No. 533, 93rd Cong., 1st Sess., at 12 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4650). This Court noted ERISA's expectation that federal courts would develop federal common law:

> The expectations that a federal common law of rights and obligations under ERISA-regulated plans would develop, indeed, the entire comparison of ERISA's § 502(a) to § 301 of the LMRA, would make little sense if the remedies available to ERISA participants and beneficiaries under

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[3] (...continued)
(2001), this Court held that ERISA preempted a Washington statute providing for automatic revocation, upon divorce, of any designation of spouse as beneficiary of a non-probate asset. *Id.* at 1326-29. The Court found the statute to be in direct conflict with ERISA's requirement that the plans be administered in accordance with the plan document. *Id.* at 1329.

> § 502(a) could be supplemented or supplanted by varying state laws.

Pilot Life, 481 U.S. at 56.

2. The Decision of the Ninth Circuit Fosters the Very Harm Which Congress Sought to Prevent in Enacting ERISA.

The Ninth Circuit's decision will create the exact patchwork scheme of regulation and enforcement which Congress sought to avoid in enacting ERISA. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990). First, denying ERISA plans the right to enforce subrogation rights in federal court under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), will result in the complete abrogation of such rights in certain states. The Ninth Circuit's decision in this case provides just such an example. The relevant state jurisdiction here, California, has already held that because ERISA makes federal district courts the exclusive forum for actions to enforce plan terms, 29 U.S.C. § 1132(e), California state courts cannot entertain jurisdiction in such matters. *Jefferson-Pilot Life Ins. Co. v. Krafka*, 57 Cal. Rptr.2d 723 (Cal. Ct. App. 1996). *See also Descant v. Administrators of the Tulane Educ. Fund*, 706 So. 2d 618 (La. Ct. App. 1998).

Other state courts, which do entertain jurisdiction, may find no remedy due to ERISA's preemption of state causes of action. Moreover, those state courts which do entertain jurisdiction and overcome ERISA preemption, are invited to apply a panoply of differing state anti-subrogation laws. These laws, in violation of plan terms, diminish subrogation rights and further prevent the uniform enforcement of plan terms. *See Ingersoll-Rand*, 498 U.S. at 142. For example, the laws of some states

prohibit the enforcement of subrogation rights against uninsured motorist recoveries, recoveries by minors, or recoveries which do not make a plan participant whole. Other states reduce the amount of the plan's recovery by an award of *pro rata* attorney's fees under the common fund doctrine.[4]

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[4] Federal courts are often forced to decide whether to apply state laws that would forbid or limit an ERISA plan's subrogation rights. When confronted with this issue, most federal courts have held that ERISA preempts such laws and that the written language of the plan should be followed. *See, e.g., FMC*, 498 U.S. 52 (1990) (ERISA preempts state automobile insurance anti-subrogation law); *Community Ins. Co. v. Richardson*, 172 F.3d 872 (6th Cir. 1999) (ERISA preempts Ohio statute prohibiting reimbursement of medical claims from municipalities); *Electro-Mechanical Corp. v. Ogan*, 9 F.3d 445 (6th Cir. 1993) (ERISA preempts Tennessee statute prohibiting subrogation of health care costs in malpractice cases); *Hampton Indus., Inc. v. Sparrow*, 981 F.2d 726 (4th Cir. 1992) (ERISA preempts North Carolina subrogation statute limiting a self-funded ERISA plan's recovery from third party settlement funds); *Davis v. Line Constr. Benefit Fund*, 589 F. Supp. 146 (W.D. Mo. 1984) (ERISA preempts state law preventing subrogation of an otherwise unassignable personal claim). Courts have also considered application of the common fund doctrine to ERISA plans. *See, e.g., Walker v. Wal-Mart Stores, Inc.*, 159 F.3d 938, 940 (5th Cir. 1998); *United McGill Corp. v. Stinnett*, 154 F.3d 168, 173 (4th Cir. 1998); *Bollman Hat Co. v. Root*, 112 F.3d 113, 118 (3rd Cir. 1997), *cert. denied*, 522 U.S. 952 (1997); *Health Cost Controls v. Isbell*, 139 F.3d 1070, 1072 (6th Cir. 1997); *Ryan v. Federal Express Corp.*, 78 F.3d 123 (3rd Cir. 1996). In *Waller v. Hormel Foods Corp.*, 120 F.3d 138, 141 (8th Cir. 1997), the court ruled that whether ERISA preempts the common fund doctrine depends on the language

(continued...)

The decision of the Ninth Circuit, if permitted to stand, will create huge administrative burdens for multi-state plans such as the Welfare Fund. These plans will have to tailor their subrogation program to conform with the varying laws from state to state regarding subrogation and reimbursement. The patchwork scheme of federal and state regulation of employee benefit plans which Congress rejected when it passed ERISA will become a reality. *See Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 9-11 (1987); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 107-08 (1983).

B. If Not Overturned, the Ninth Circuit's Decision Will Diminish a Valuable and Equitable Cost-Saving Mechanism for Self-Funded Plans.

As this Court has recognized, uniformity and equal enforcement of Plan provisions ultimately inures to the benefit of plan participants:

> A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them. Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations.

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[4] (...continued)
of the benefit plan. In *Cutting v. Jerome Foods, Inc.*, 993 F.2d 1293, 1296 (7th Cir. 1993), *cert. denied*, 510 U.S. 916 (1993), and *Fields v. Farmers Ins. Co., Inc.*, 18 F.3d 831, 835-36 (10th Cir. 1994), courts held that the terms of the plan override contrary state laws related to subrogation in Wisconsin and Oklahoma, respectively. *See also* footnote 7, *infra*, pp. 12, 13.

Fort Halifax, 482 U.S. at 11 (1987) (citing H.R. Rep. No. 533, 93rd Cong., 1st Sess., at 12 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4650).

Since the laws and regulations applicable to health care benefits vary widely from state to state, the disruptive effect of state regulation is compounded for employee benefit plans, such as the Welfare Fund, which have employees in more than one state. Benefit plans which operate in many states often choose to self-fund benefit payments rather than purchase insurance to cover such benefits. Because state laws vary dramatically, purchasing insurance for plans which operate in many states is inefficient, inequitable and increasingly expensive.[5] It was for this reason that Congress passed the preemption clause of ERISA, 29 U.S.C. § 1144. *See Fort Halifax*, 482 U.S. at 10; *see also FMC Corp. v. Holliday*, 498 U.S. 52 (1990).

Moreover, many cost-containment measures implemented by employee benefit plans transfer actual costs to beneficiaries or restrict the type, length or choice of

[5] The Ninth Circuit's decision will lead plans to reconsider their policy of advancing payment for medical bills related to injuries sustained in accidents. If benefit plans cannot enforce subrogation rights in certain states, and in order to avoid having one employer subsidize the benefits of another employer's employees, multiemployer plans could add plan provisions to exclude from coverage claims related to accidents in those states where the plan's subrogation provision could not be enforced. Although compensating for lost subrogation recoveries, this added layer of administration would delay payment of a beneficiary's benefits, increase the cost of administering the plan, and lead to the hodge-podge administration of plans which ERISA condemned.

medical care. Unlike such cost-containment measures, subrogation and reimbursement provisions merely prevent the duplication of benefits by the plan where other coverage exists for a particular injury or illness. In other words, the participant does not recover twice for accident-related medical damages. The responsibility for the medical care is shifted to the party causing the injury or to the specific-risk insurer which has specifically assumed the kind of risk leading to the injury. Subrogation not only shifts the costs of medical care to the responsible party, but also constitutes a valuable cost-savings device. Since the inception of the Welfare Fund's subrogation program, the Welfare Fund has achieved recoveries and subrogation savings totaling approximately $67.5 million.

C. The Decision of the Ninth Circuit Limits the Ability of Plan Trustees to Administer the Plan in Accordance with ERISA's Mandate.

ERISA requires that every employee benefit plan be established pursuant to a written instrument and that named fiduciaries control and manage the operation and administration of the Plan. 29 U.S.C. § 1102(a)(1). Congress bestowed upon fiduciaries the power and authority to accomplish these objectives by enacting ERISA's enforcement mechanism, Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3). Section 502(e) of ERISA, 29 U.S.C. § 1132(e), makes federal district courts the exclusive jurisdiction for actions by fiduciaries to enforce plan terms and redress violations of plan terms. The relief which Section 502(a)(3) allows is "appropriate equitable relief." 29 U.S.C. § 1132(a)(3).

In finding equitable relief unavailable in the instant action by a plan to enforce plan terms against a plan

beneficiary, the Ninth Circuit left plan fiduciaries without a forum in which to bring such actions. As already noted, the relevant state forum in this case, California, has taken the position that it is without jurisdiction to entertain such an action by a plan to enforce subrogation rights. Moreover, as stated previously, in light of ERISA's preemption of state laws and the panoply of state antisubrogation laws, state courts which do entertain jurisdiction may not afford adequate relief.[6]

Subrogation is not a simple contractual matter between an insured and its insurer where state issues predominate. Subrogation involves a core ERISA issue, *viz.*, the recoupment of plan benefits paid to beneficiaries through the enforcement of plan terms by plan fiduciaries. In hardship cases, trustees of the trust must balance the interests of all beneficiaries against the interests of the beneficiary being asked to reimburse the plan. Moreover, in many instances, the enforcement of subrogation rights by a self-funded employee benefit plan involves the interpretation of a plan's precise subrogation provision. All of these are functions best left to the discretion of plan Trustees.[7]

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[6] The impact of the Ninth Circuit's decision has broad implications for ERISA plans beyond subrogation and reimbursement rights. That decision may, for example, prevent plans from obtaining recoveries of overpayments from providers and beneficiaries or from properly coordinating benefits with other plans and insurers.

[7] Plan fiduciaries must decide whether the written terms of the plan include recoveries from tortfeasors as well as their insurers or recoveries from uninsured motorist coverage. *See Health Cost Controls v. Washington*, 187 F.3d 703, 711-12 (7th (continued...)

Because ERISA considerations permeate the enforcement of Plan terms such as subrogation, Congress legislated that federal district courts have exclusive jurisdiction to enforce Plan terms and redress violations of

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[7] (...continued)
Cir. 1999), *cert. denied*, 120 S. Ct. 979 (2000); *Wendy's Int'l, Inc. v. Karsko*, 94 F.3d 1010, 1013 (6th Cir. 1996); *Sunbeam-Oster Co., Inc. v. Whitehurst*, 102 F.3d 1368, 1378 (5th Cir. 1996). Another question of interpretation arises when the written terms of the plan set the priority of allocations between the subrogee and subrogor. *See Hiney Printing Co. v. Brantner*, 243 F.3d 956, 960 (6th Cir. 2001) (applying federal common law make whole rule where plan language was ambiguous as to whether plan's reimbursement rights applied to a partial recovery); *Harris v. Harvard Pilgrim Health Care, Inc.*, 208 F.3d 274, 280-81 (1st Cir. 2000) (holding that application of the make whole rule is precluded where an ERISA plan unambiguously requires its members to reimburse plan for all benefits paid); *Copeland Oaks v. Haupt*, 209 F.3d 811, 813-14 (6th Cir. 2000) (applying make whole rule where plan language failed to establish plan's priority right over any partial recovery); *Cagle v. Bruner*, 112 F.3d 1510, 1520-22 (11th Cir. 1997) (applying make whole doctrine where plan language did not specifically reject doctrine), *reh'g denied*, 124 F.3d 223 (11th Cir. 1997); *Sunbeam-Oster Co.*, 102 F.3d at 1373-76 (refusing to apply make whole doctrine where plan language was clear and unequivocal in providing plan with right to reimbursement for full amount of benefits paid); *Cutting v. Jerome Foods, Inc.*, 993 F.2d 1293, 1298-99 (7th Cir. 1993) (holding that ERISA plan administrator was not unreasonable in interpreting plan provision as effectively disclaiming make whole doctrine), *cert. denied*, 510 U.S. 916 (1993). *See also Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 114-15 (1989) (arbitrary and capricious standard applied when plan gives fiduciary discretionary authority to construe terms of plan).

those terms. These are core ERISA issues best left, as Congress intended, to the federal courts which can ensure the uniformity of enforcement of plan terms which ERISA intends. Contrary to the Ninth Circuit's position, the equitable relief which Congress set forth in ERISA is sufficient to accomplish these objectives.

D. The Decision of the Ninth Circuit is Incorrect. Various Forms of Appropriate Equitable Relief Are Available to Plans Which Seek to Enforce Subrogation and Reimbursement Rights.

1. The Instant Case in Which Plan Trustees Seek to Enforce Plan Terms Against a Plan Beneficiary is Distinguishable from *Mertens v. Hewitt Associates*.

The Ninth Circuit Court of Appeals erred in holding that equitable relief is unavailable to Great-West in the enforcement of its subrogation and reimbursement rights against its beneficiary. In finding no equitable remedy, the Ninth Circuit relied on its prior decision in *FMC Medical Plan v. Owens*, 122 F.3d 1258, 1262 (9th Cir. 1997), which incorrectly interpreted this Court's decision in *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993). In *Mertens*, a class of former employees of an ERISA pension plan sued the plan's actuary for an alleged knowing participation in plan fiduciaries' breach of fiduciary duties. *Id.* at 250-51. The plaintiffs in *Mertens* sought only a legal remedy and money damages and not "appropriate equitable relief" under ERISA. *Id.* at 255-56. This court found that requiring a nonfiduciary to make the plan whole for losses it sustained as a result of the alleged breach of fiduciary duties would not constitute "appropriate equitable relief." *Id.* at 255-59.

Unlike the claim in *Mertens* which sought monetary recovery for injury to property, the claim brought by Great-West is an action against a beneficiary by a fiduciary to enforce the specific term of the trust as required by ERISA.[8] Great-West does not seek mere compensatory damages. Instead, Great-West seeks an order requiring its beneficiary to comply with plan terms.

2. A Fiduciary Suing to Enforce Subrogation and Reimbursement Rights Set Forth in the Plan Seeks Specific Performance of Plan Terms.

Plan fiduciaries disburse plan benefits, and beneficiaries receive plan benefits, subject to the terms of the plan including subrogation and reimbursement. When a beneficiary such as Janette Knudson refuses to reimburse the plan as required by plan terms, plan fiduciaries may sue under Section 502(a)(3) of ERISA, 29

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[8] The specific plan terms at issue here provide that when a third party may be liable or legally responsible for expenses incurred by a covered person for a bodily injury, Great-West will pay covered expenses related to treating that injury. Under these circumstances, Great-West will, at its option, have the right to recover from its covered person any payment for benefits paid for treatment of such loss which the covered person is entitled to receive from a third party. The Plan creates a first lien upon any recovery the covered person receives from the third party, the third party's insurer, or from uninsured motorists insurance. If Great-West's covered person makes any recovery therein set forth and fails to reimburse the plan, then the covered person is personally liable to Great-West to the extent of its lien. (Joint App. at 58-59.)

U.S.C. § 1132(a)(3), to specifically enforce the subrogation and reimbursement rights set forth in the plan document. The fact that such specific enforcement requires the plan beneficiary to turn over to the plan sums of money does not change the character of the relief from specific performance of plan terms to money damages. *See, e.g., Administrative Comm. v. Gauf,* 188 F.3d 767 (7th Cir. 1999); *Blue Cross & Blue Shield of Ala. v. Sanders*, 138 F.3d 1347 (11th Cir. 1998); *Southern Council of Indus. Workers v. Ford*, 83 F.3d 966 (8th Cir. 1996).

This Court has also recognized the distinction between an action for specific relief (even when the specific relief is money) and an action for compensatory damages. In *Bowen v. Massachusetts*, 487 U.S. 879 (1988), the state of Massachusetts brought suit in federal district court to overturn a decision rendered by the Secretary of Health and Human Services which disallowed reimbursement under the Medicaid Act. The Secretary, asserting that Massachusetts' claim was for money damages only, argued that Section 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, mandated dismissal. That section provides, in part:

> An action in a court of the United States *seeking relief other than money damages* . . . shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702 (emphasis added).

In addressing the Secretary's argument, this Court first recognized the distinction between a legal action for

money damages and an action for specific relief including money. This Court stated:

> Our cases have long recognized the distinction between an action at law for damages—which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation—and an equitable action for specific relief—which may include an order providing for . . . "the recovery of specific property *or monies*. . . ." The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as "money damages."

Bowen, 487 U.S. at 893 (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949), *reh'g denied*, 338 U.S. 840 (1949)).

The Court concluded that Massachusetts' suit was "not a suit seeking money in *compensation* for the damage sustained by the failure of the Federal Government to pay as mandated," but rather a suit "seeking to enforce the statutory mandate itself, which happens to be one for the payment of money." *Id.* at 900. This Court found that Massachusetts' suit was one for specific relief properly brought in federal district court.[9] *Id.*

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[9] In *Bowen*, this Court quoted extensively and approvingly from the D.C. Circuit's decision in *Maryland Dept. of Human Resources v. Department of Health & Human Services*, 763 F.2d 1441 (D.C. Cir. 1985). In *Maryland*, the Court considered, *inter alia*, whether it had federal question jurisdiction over an action against Maryland alleging misspent federal grant moneys received pursuant to Title XX of the Social

(continued...)

Although this Court's decision in *Bowen* did not turn on the distinction between equitable actions and other actions, *Department of Army v. Blue Fox, Inc.*, 525 U.S. 255 (1999), the Court in *Bowen* did note that the specific equitable remedy of specific performance is, in many instances, in the form of money. The *Bowen* Court states as follows:

> Thus, while in many instances an award of money is an award of damages, [o]ccasionally a money award is also a specie remedy. *Id.* Courts frequently describe equitable actions for monetary relief under a contract in exactly those terms. *See, e.g., First National State Bank v. Commonwealth Federal Savings & Loan Association*, 610 F.2d 164, 171 (3d Cir. 1979) (specific performance of contract to borrow money); *Crouch v. Crouch*, 566 F.2d 486, 488 (5th Cir. 1978) (contrasting lump-sum damages for breach

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[9] (...continued)
Security Act. *Id.* at 1443. The resolution of this question depended upon whether Maryland was seeking relief other than money damages. In finding the relief sought by Maryland specific equitable relief, the D.C. Circuit distinguished such relief from money damages:

> The term "money damages," 5 U.S.C. Sec. 702, we think, normally refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies "are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled." D. Dobbs, Handbook on the Law of Remedies 135 (1973).

Maryland, 763 F.2d at 1446.

> of promise to pay monthly support payments with an order decreeing specific performance as to future installments); *Joyce v. Davis*, 539 F.2d 1262, 1265 (10th Cir. 1976) (specific performance of a promise to pay money bonus under a royalty contract).

Bowen, 487 U.S. at 895 (quoting *Maryland*, 763 F.2d at 1446). Specific remedies are contrasted with the substituted remedy of money damages. *See* Dan B. Dobbs, *Handbook on the Law of Remedies* § 3.1, at 135 (1973). The specific equitable remedy of specific performance attempts to give the plaintiff the very thing to which he is entitled. *Id.* Plan trustees who seek to enforce plan terms against a plan beneficiary are seeking the equitable remedy of specific performance even when that remedy results in monetary relief. The payment of money is the specific performance required and is not a substituted remedy.[10]

The instant claims, unlike the claims in *Mertens*, are not for the substitute relief of money damages. Like the claims in *Bowen*, where the Secretary sought to enforce a specific provision of a statute, the instant claims are for specific relief. Moreover, the specific relief requested here is equitable relief, *viz.*, the specific performance of the obligations of plan participants set forth in the plan. As this Court recognizes, the fact that the relief happens

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[10] There is also no adequate remedy at law here. As noted previously in Section III A2 of this brief, pp. 7-8, California state courts would afford no relief here. State courts which do entertain jurisdiction may apply ERISA preemption or a variety of state antisubrogation laws to further limit relief in state court.

to be the payment of money to the plan does not change the character of this specific relief to money damages. *See Bowen*, 487 U.S. at 893; *School Comm. of Burlington v. Department of Educ. of Massachusetts*, 471 U.S. at 370-71.

3. Restitution and a Constructive Trust are Additional Equitable Remedies Available to Plans Seeking to Enforce Subrogation and Reimbursement Rights.

Subrogation is "the substitution of another person in place of the creditor to whose rights he or she succeeds in relation to the debt, and gives to the substitute all the rights, priorities, remedies, liens, and securities of the person for whom he or she is substituted." 16 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance 3D* § 222:5 (2000). Thus, the rights of the plan to its participant's claims arise the moment the Plan pays injury-related benefits. The rights of the Plan to settlement moneys sufficient to satisfy its subrogation interest attach the moment such funds come into existence. As stated by *Couch*:

> The right of a subrogated insurer extends to any fund against which the insured had a right to proceed in order to satisfy his or her claim had he or she not been paid by the insurer, and an insurer entitled to subrogation is entitled to have any money received by the insured or his or her attorney which represents payment on the claim to which the insurer has been subrogated held for the use and benefit of the insurer.
>
> If not, the insurer has the right to trace the fund and recover it from whomever holds it . . . .

Id. § 223:89 (footnotes omitted). In the instant case, Janette Knudson holds settlement funds received in satisfaction of claims to which Great-West is subrogated. These funds properly belong to Great-West and are held by Janette Knudson for the use and benefit of Great-West. In retaining these funds, Janette Knudson is unjustly enriched.

Both restitution and the imposition of a constructive trust are available to plans to prevent unjust enrichment and to protect subrogation and reimbursement rights. Although both of these equitable remedies would result in the payment of money to Great-West, these remedies are still equitable remedies. *See Tull v. United States*, 481 U.S. 412 (1987) (disgorgement of improper profits is equitable remedy); *Curtis v. Loether*, 415 U.S. 189 (1974) (back pay is a form of equitable restitution).

Restitution is an equitable remedy which restores something of value to the rightful owner and prevents a person from being unjustly enriched. *See Black's Law Dictionary* 910 (6th ed. 1991); Restatement of Restitution § 1 (1937). In the instant case; the remedy of restitution requires that Janette Knudson return to Great-West those funds to which Great-West is entitled. Absent restitution, Janette Knudson remains unjustly enriched.

The imposition of a constructive trust is also an appropriate equitable remedy here. A constructive trust imposes upon a person the equitable duty to convey property to another on the ground that retention of the property would be wrongful and would unjustly enrich such person. Restatement (Second) of Trusts § 1 cmt. e (1959); Restatement of Restitution § 160 (1937). The effect of a constructive trust prevents a loss to the plan and a corresponding unjust gain to the plan beneficiary. Restatement of Restitution § 160 cmt. d (1937).

Contrary to the rule in the Ninth Circuit, a constructive trust is not based on actual wrongdoing but on equity and fairness. *See Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 251 (2000). Moreover, even if such wrongdoing is a prerequisite for the imposition of a constructive trust, such wrongdoing is present here. Janette Knudson's retention of that portion of settlement funds sufficient to satisfy Great-West's subrogation and reimbursement rights is wrongful, in violation of plan terms and ERISA, and unjustly enriches her. Janette Knudson has asserted control over funds which properly belong to Great-West under plan terms. The imposition of a constructive trust over these funds constitutes "appropriate equitable relief" under ERISA.

IV. CONCLUSION

The decision of the Ninth Circuit Court of Appeals in this case is directly at odds with the goals of Congress in enacting ERISA. If permitted to stand, that decision will subject employee benefit plans to non-uniform regulation and enforcement. The consequent increased administrative expense and decreased subrogation recoveries will result in a loss of benefits for plan beneficiaries. Plan fiduciaries will be denied the uniform enforcement mechanism needed to enforce plan terms and redress violations of plan terms. Moreover, that decision conflicts with decisions of this Court and is clearly incorrect. Equitable relief in the form of specific performance, restitution, and constructive trust is available to plan fiduciaries suing plan beneficiaries in order to enforce plan terms and redress violations of plan terms. For the reasons stated above, Central States, Southeast and

Southwest Areas Health and Welfare Fund respectively requests this Honorable Court to overturn the decision of the Court of Appeals for the Ninth Circuit in this case.

May 3, 2001

Respectfully submitted,

WILLIAM J. NELLIS
Secretary to the Board
of Trustees
Central States, Southeast
and Southwest Areas
Health and Welfare Fund
9377 W. Higgins Road
Rosemont, Illinois 60018
(847) 518-9800

JOHN A. KUKANKOS
Counsel of Record
JAMES L. COGHLAN
FRANCIS E. STEPNOWSKI
DEBRA M. CYRANOSKI
COGHLAN KUKANKOS COOK
One N. Franklin Street
Suite 900
Chicago, Illinois 60606
(312) 357-9200

Attorneys for Amicus Curiae